IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 2000 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI

AND

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

MATHURBHAI MADHABHAI

Versus

SAVITABEN @ KANCHANBEN JADAVBHAI

Appearance:

MR AJAY R MEHTA for Petitioners

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE H.R.SHELAT

Date of decision: 16/07/98

ORAL JUDGEMENT (Per: S.M. Soni, J.)

Driver, owner, and Insurance Company, against

whom an award came to be passed by Motor Accident Claims Tribunal (Auxiliary), Bhavnagar in M.A.C.P. No. 243 of 1997 in favour of the claimants-respondents, have preferred this appeal challenging its award.

2. Heard learned advocate, Mr. Rajni Mehta for the appellants. We have never said at any time in the beginning of the appeal or in the course of hearing of the appeal that joint appeal by driver, owner and Insurance Company is not maintainable. However, on such wrong assumption, Mr. Mehta has proceeded making his submissions that such appeals are maintainable. In our view, joint appeal is maintainable but the case of each appellant is required to be considered as if he has filed a separate appeal. So far as the appeal by appellants, i.e., driver and owner are concerned, we do not find any merits in any of their contention challenging in particular both the aspects of negligence and quantum. We say so because none of them had filed any written statement nor have they led any evidence oral or documentary. They have even not cross-examined the witness of the claimant. No contention to challenge the award on any law point is raised. Therefore, we do not find any merits in any of the contention to challenge the award.

3. So far as the appeal by Insurance Company is concerned, the Insurance Company in this case before the Tribunal is joined as a party, in view of the provisions of Section 149 of the Motor Vehicles Act, 1988. (the `Act' for short). Despite their being a party in the proceeding, and having knowledge that driver and owner have not filed written statement, they have not sought necessary permission to be joined as a party under Sec. 170 of the Act so as to entitle to challenge the claim on merits. As the Insurance Company is not joined as party under Section 170 of the Act, they have no right to challenge the award on any of the grounds, except those available under Section 149 of the Act. Thus, in our opinion, the appeal of either of the appellants, cannot be entertained as no illegality or irregularity is shown to us.

4. As the learned advocate, Mr. Mehta has proceeded on the assumption that it is our view that the joint appeal is not maintainable. He has relied on judgments in the case of Narendra Kumar and another Vs. Yarenissa and others - 1998 ACJ 244; Shankarayya And Another Vs. United India Insurance Co. Ltd. And Another - (1998) 3 SCC 140); and also Bhagirati K.R. Naik (Smt) & Ors. Vs. Oriental Fire & General Insurance Co.Ltd. & Ors. - JT

1998 (4) SC 306 to substantiate his say that appeal can be entertained. Our conclusions, stated above, are also based on this very judgments. So far as the decision in the case of Narendra Kumar is concerned, Mr. Mehta has taken a serious exception to the following observation in Para 6 of that judgment;

> "If for some reason or the other claimants desire to execute the award against the tortfeasors because they are not in a position to recover the money from the insurer the law does not preclude them from doing so and, therefore, so long as the award or decree makes them liable to pay the amount of compensation they are aggrieved persons within the meaning of section 110-D and would be entitled to prefer an appeal."

Serious exception to this observation is taken "because in his view such a situation, namely that awardee may not be able to recover the award amount from insurance company, can never happen. Mr. Mehta contended that this situation can never arise either in present; or future and it has not arisen in past. The Supreme Court has not proceeded in the matter about the maintainability of appeal on this ground, but it has only laid down by way of an example, and that becomes clear from subsequent observation in that very para which reads as under;

> "But merely because a joint appeal is preferred and it is found that one of the appellants, namely, the insurer, was not competent to prefer an appeal, we fail to see why the appeal by the tortfeasor, the owner of the vehicle cannot be proceeded with after dismissing or rejecting the appeal of the insurer. To take a view that the owner is not an aggrieved party because the insurance company is liable in law to answer judgment would lead to an anomalous situation in that no appeal would lie by the tortfeasors against any award because the same logic applies in the case of a driver of the vehicle. The question can be decided a little differently. Can a claim application be filed against the insurance company alone if the tortfeasors are not the aggrieved parties under section 110-D of the Act ? The answer would obviously be in the negative. If that is so, they are persons against whom the claim application must be

preferred and an award sought for otherwise the insurer would not be put to notice and would not be liable to answer judgment as if a judgment-debtor. Therefore, on first principle it would appear that the contention that the owner of a vehicle is not an aggrieved party is unsustainable."

The Supreme Court has made it clear about the maintainability of appeal in Para 7, which reads as under;

"7. For the reasons stated above, we are of the opinion that even in the case of a joint appeal by the insurer and owner of offending vehicle if an award has been made against the tortfeasors as well as the insurer even though an appeal filed by the insurer is not competent, it may not be dismissed as such. The tortfeasor can proceed with the appeal after the cause-title is suitably amended by deleting the name of the insurer."

5. In view of the judgment in the case of Narendra Kumar (Supra), joint appeals are maintainable, but simply because appeal of one of the appellants is not maintainable, that by itself does not make appeal of other appellants not maintainable. Appeal of any of the appellant if found maintainable, qua that appellant the same is required to be decided in accordance with law. Simple because a joint appeal is filed, disqualification of one or other appellant should not make appeal of others not maintainable.

6. In the present case, necessary application under Section 170 of the Act was not filed by the Insurance Company and therefore the case of the Insurance Company is squarely covered by the ratio of decision in the case of Shankarayya and another (Supra).

7. Mr. Mehta further contended, that in absence of any application under Section 170 of the Act the right of the Insurance Company to prefer an appeal on merits is not affected in view of the judgment in the case of Bhagirati K.R. Naik (Smt) (Supra). Mr. Mehta contended, that within 11 days of the judgment in Shankarayya's case the Supreme Court has entertained an appeal of a claimant against the judgment and order of the High Court which entertained an appeal of the

Insurance Company on merits, though it appears that there in that case necessary permission, for joining as party under Section 170 of the Act, was not obtained. Mr. Mehta therefore contended, that relying on the judgment in Bhagirati's case, the present appeal may be entertained even on merits, as the judgment later in point of time must be followed (as observed in the case of T.S. Rabari Vs. Government of Gujarat 1991 (2) GLR Page 1035. We do not dispute the proposition that when there are two conflicting judgments of coordinate benches of the same Court, the decision later in point of time is required to be followed, provided a common question was before both the courts. Whether an appeal by Insurance Company can be entertained on merits when it is not a party in proceeding on obtaining necessary permission under Section 170 of the Act, was not a question, either raised, canvassed or considered in Bhagirati's case, while in the case of Shankarayya, such was the question for consideration before the Supreme Court. Therefore, in our opinion, these two judgments in the cases namely, Shankarayya and Bhagirati, cannot be said to be conflicting decisions.

8. It is brought to our notice by learned advocate, Mr. Mehta, that all the opponents were represented by an advocate and advocate of the Insurance Company has cross-examined the claimants'-witness on merits of the case and the same was neither objected to by claimants nor by Tribunal. This by itself does not create any right in favour of Insurance Company. This by itself does not amount to grant of permission u/s. 170 of the Act. As Insurance Company is not joined as party opponent on obtaining necessary permission under Section 170 of the Act, even if the Tribunal has permitted the advocate of the Insurance Company to cross-examine the claimants' witness on merits, and/or even if the claimant/s have not objected to that, that cross-examination is all irrelevant and inadmissible and cannot be read as evidence by the Tribunal. In the award, it is made clear by the Tribunal, that though opponents Nos. 1 & 2, namely driver and owner have filed their appearance, at the time of hearing they were absent on call and there is no cross-examination by them of witness/s of the claimants.

9. In view of the above, we do not find any merits in any of the contentions raised to interfere with the order passed by the Tribunal. Hence appeal dismissed.

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(rmr).

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(R.M. Ravindran)
Private Secretary
to the Hon'ble Judge
High Court of Gujarat
Ahmedabad